

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA,)	CASE NO. 8:04CR541
)	
Plaintiff,)	
)	
vs.)	TENTATIVE FINDINGS
)	
SILVERIO MATA,)	
)	
Defendant.)	

The Court has received the Revised Presentence Investigation Report (“PSR”) and the Defendant’s objections thereto (Filing No. 25). See Order on Sentencing Schedule, ¶ 6. The Court advises the parties that these Tentative Findings are issued with the understanding that, pursuant to *United States v. Booker*, 2005 WL 50108 (U.S. Jan. 12, 2005), the sentencing guidelines are advisory.

The Defendant objects to the criminal history point assessed in ¶ 31. The objection is to the fact of the conviction, and the government bears the burden by a preponderance of the evidence.

The Defendant also objects to the criminal history point assessed in ¶ 34 for the reason that the Defendant was not represented by or advised of his right to counsel, did not waive his right to counsel, and was sentenced to jail time. The government bears the burden of proving the conviction, and then the burden shifts to the Defendant to prove that the prior conviction was constitutionally invalid. *United States v. Stapleton*, 316 F.3d 754, 755 (8th Cir. 2003). The burdens are by a preponderance of the evidence.

IT IS ORDERED:

1. The Defendant's Objections to the Presentence Investigation Report (Filing No. 25) will be heard at sentencing;
2. Otherwise the Court's tentative findings are that the Presentence Investigation Report is correct in all respects;
3. If **any** party wishes to challenge these tentative findings, the party shall immediately file in the court file and serve upon opposing counsel and the Court a motion challenging these tentative findings, supported by (a) such evidentiary materials as are required (giving due regard to the requirements of the local rules of practice respecting the submission of evidentiary materials), (b) a brief as to the law, and (c) if an evidentiary hearing is requested, a statement describing why an evidentiary hearing is necessary and an estimated length of time for the hearing;
4. Absent submission of the information required by paragraph 3 of this Order, my tentative findings may become final; and
5. Unless otherwise ordered, any motion challenging these tentative findings shall be resolved at sentencing.

DATED this 13th day of May, 2005.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge